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Supreme Court, U.S.
FILED
JAN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MOSE KOREY,
Petitioner,

vs.

CITY OF DAVENPORT, IOWA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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18 pp

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STATUTES INVOLVED IN THE CASE

Code of Iowa, Section 613A.5 provides as follows:

> Every person who claims damages from any municipality or any officer, employee, or agent of a municipality for or on account of any wrongful death, loss or injury within the scope of Section 613A.2 or Section 613A.8 or under common law shall commence an action therefor within six months, unless said person shall cause to be presented to the governing body of the municipality within sixty days after the alleged wrongful death, loss or injury a written notice stating the time, place, and circumstances thereof and the amount of compensation or other relief demanded. Failure to state time or place or circumstances or the amount of compensation or other relief demanded shall not invalidate the notice; providing, the claimant shall furnish full information within fifteen days after demand by the municipality. No action therefor shall be maintained unless such notice has been given and unless the action is commenced within two years after such notice. The time for giving such notice shall include a reasonable length of time, not to exceed ninety days, during which the person injured is incapacitated by his injury from giving such notice.

Code of Iowa, Section 614.1 provides as follows:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> * * *
>
> **2. Injuries to person or reputation — relative rights — statutory penalty.**
>
> Those founded on injuries to the person or reputation, including injuries to relative rights, whether bas-

ed on contract or tort, or for a statute penalty, within two years.

* * *

4. Unwritten contracts — injuries to property — fraud — other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within 5 years, except as provided by subsections 8 and 10.

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OCTOBER TERM, 1985

MOSE KOREY,
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vs.

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On Writ of Certiorari to the United States
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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Mose Korey, has for many years, been engaged in farming near Duck Creek in the City of Davenport. The City has developed around him. Prior to 1969 Davenport obtained federal grant money for acquisition of land in the Duck Creek flood plain for park purposes, specifically the construction of a cross-town off-street bicycle path. The City began acquiring land in the flood plain and in 1969 condemned approximately 20 acres of Mr. Korey's land. In the early to mid 1970's, Petitioner consulted with legal counsel regarding remedies available for claimed violations of his rights in connection with that condem-

nation. His attorneys were allegedly denied opportunities to speak at City Council meetings or to the Mayor in 1972. In 1975 Petitioner was allegedly denied permission to plant on the land condemned from him. He was allegedly prohibited from taking firewood from the land in 1981. By 1980, the bicycle path construction project was reaching the land condemned from Petitioner. That same year, other land was condemned for drainage easements and the construction of ditches and storm sewers was commenced. Mr. Korey protested this condemnation but acquiesced in the monies awarded by the condemnation commission.

This action is one in a series of litigated disputes between the parties. In June 1969 Petitioner sued in state court to enjoin the condemnation. An order was issued setting a hearing for a temporary injunction and directing the City to take no further action pending the hearing. The hearing did not take place and there were no further proceedings in that case, although Mr. Korey now claims the condemnation proceedings were void because the City violated the order. In July 1969 Petitioner appealed the award of the condemnation commission. At the second trial of that cause, the damages awarded were nearly double the amount set by the condemnation commission. He appealed to the Iowa Supreme Court but withdrew his notice of appeal before the court considered the matter. In September 1979 Petitioner filed suit to quiet title to a strip of land in the vicinity of the condemned property. The matter was tried to the court and title was quieted in the City. Petitioner's appeal was dismissed for failure to prosecute. In June 1980 Mr. Korey sued to enjoin the City from entering the condemned land and from constructing the bicycle path. After a hearing, Petitioner was denied a temporary injunction and a cost judgment was entered against him. In February 1982 Petitioner filed a small claims action for flooding damage to crops. The action was amended to include a prayer for an injunction to abate a nuisance obstructing his drainage. He voluntarily dismissed before the case was set for trial. This action followed in October of 1983 on Mose

Korey's pro se complaint under 42 U.S.C. Sections 1982, 1983, 1985 and 1986, alleging violations of various rights, including the taking of property without just compensation and in violation of condemnation statutes, HUD rules and a court order, freedom of speech and to petition for redress of grievances, invasion of privacy, conspiracy, discrimination and harassment. After the answer and some discovery, the City moved for summary judgment based on the applicable statutes of limitations, laches, estoppel, and claim and issue preclusion. Petitioner vigorously resisted. The motion was sustained by the Honorable William C. Stuart, United States District Court for the Southern District of Iowa. Petitioner's request to reconsider was overruled. He then appealed to the United States Court of Appeals for the Eighth Circuit which summarily affirmed the District Court prior to receipt of the City's brief and now petitions for a writ of certiorari.

ARGUMENT

I. The Procedural Issues Presented By Petitioner Do Not Require Resolution By This Court.

Petitioner presents several matters of procedure as grounds for granting certiorari. The orders of which he complains are in accord with established rules and procedures and do not involve important or substantial questions of practice and judicial administration.

Petitioner's first complaint is that he was not given three additional days for filing his rehearing petition. While Rule 26(a), FRAP, does add three days when a party is to act within a specified number of days after a document is served upon him and the document is served by mail, the time for filing a petition for rehearing runs not from service but rather from the entry of judgment. Rule 40(a), FRAP. Judgment was entered August 15, 1985, and Petitioner was required to file his rehearing petition within 14 days thereof. It was filed when it was received by the clerk pursuant to Rule 25(a), FRAP. That was on the 15th day. The Court of Appeals correctly ruled it was untimely.

Petitioner's second complaint concerns the finality of the order of August 15, 1985, as it pertains to his time for petitioning this Court. The order in question was the judgment of the Court of Appeals affirming summary judgment for the City. It conclusively determined the rights of the parties, leaving nothing to be done but execution of the judgment. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351, 357 (1978); *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911, 916 (1945).

His third complaint is that the orders and filings from the Court of Appeals do not bear the signature of a member of the Court. As is clear from Rules 36 and 41(a) FRAP, the appellate courts are not required to issue opinions and the clerk is responsible for preparing, signing and entering judgment, and pro-

viding copies thereof to the parties. This was done. Nothing more is required of the Court of Appeals or to be expected by the parties.

The clerk and court below acted pursuant to the applicable and established procedural rules and practices. Petitioner has failed to present questions of substantial importance affecting practice and judicial administration. The petition for writ of certiorari should, therefore, be denied.

II. There Is No Conflict Between The Rulings Below And Decisions Of Other Circuits Or The Supreme Court Warranting The Granting Of The Petition For Writ Of Certiorari.

Petitioner alleges the existence of a conflict between the decisions below and decisions elsewhere as justifying review by this Court. This conflict is an illusion, created by pulling quotations from a number of Supreme Court and Circuit Court decisions out of context. Showing that courts have said summary judgment is improper when the motion is not properly supported or when there are genuine issues of material fact is to show nothing by way of a conflict in decisions. It is quite clear that summary judgment can be granted in cases involving constitutional and civil rights claims where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See, for example, *Gorin v. Osborne,* 756 F.2d 834 (11th Cir. 1985); *Russell v. Harrison,* 736 F.2d 283 (5th Cir. 1984); *Benavidez v. Gunnell,* 722 F.2d 615 (10th Cir. 1983); *Silverman v. Ballantine,* 694 F.2d 1091 (7th Cir. 1982).

Showing that courts have found a genuine issue of material fact in a couple of cases where fraudulent concealment was interposed in the face of a statute of limitations defense is to show nothing by way of a conflict as each case must be determined on its own facts. In resisting summary judgment, Petitioner did not deny he had consulted with counsel regarding his rights and

remedies in the early to mid 1970's, nor did he present any evidence that critical information was concealed from him, much less concealed for such a period as to make his suit timely.

Showing that as a pro se plaintiff he is to be held to a less stringent standard of pleading, per *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), *rehearing denied,* 405 U.S. 948, 92 S.Ct. 963, 30 L.Ed.2d 819 (1972), is to show nothing by way of a conflict as this case arises on summary judgment not on a motion to dismiss for failure to state a claim upon which any relief can be granted.

That a plaintiff is entitled to a federal jury does not require a useless jury trial. Indeed, the purpose of summary judgment is to avoid useless trials. *Klinge v. Lutheran Charities Ass'n. of St. Louis,* 523 F.2d 56, 61 (8th Cir. 1975).

There is no true conflict between the rulings in this case and decisions of other circuits or of the Supreme Court. Granting the petition for writ of certiorari on this basis is not justified.

III. As The Summary Judgment Motion Was Correctly Decided, Review By This Court Is Unnecessary.

In this action, the Petitioner has consistently misapprehended the narrow scope of the issues presented by the summary judgment motion. The major inquiries are simply whether his suit was brought in time and whether he previously had his day in court on the complaints he urges. The facts germane to these issues are the times at which the actions complained of occurred, when Petitioner acquired knowledge of them and the history of the litigation between the parties, and these facts are not disputed. The facts were analyzed by the District Court in light of the applicable legal principles, namely the established rules of limitations of actions and claim and issue preclusion. After doing so, the District Court entered summary judgment for the City and the Court of Appeals summarily affirmed finding no error of law or fact. While the outcome of this case is of great interest to the parties, the propriety of summary judgment

here is not a question of such overriding and substantial public interest as to require review by this Court.

A. Statute of Limitations.

Until the recent decision in *Wilson v. Garcia,* 471 U.S. ____, 107 S.Ct. ____, 85 L.Ed.2d 254 (1985)[1], the Iowa statute of limitations applicable to federal civil rights action other than those brought under Section 1986[2], was the five year period for actions not otherwise provided for, *Code of Iowa,* Section 614.1(4). *Branchcomb v. Brewer,* 683 F.2d 251 (8th Cir. 1982); *Garmon v. Foust,* 668 F.2d 400 (8th Cir. 1982), *cert. denied,* 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982); *Tatum v. Golden,* 570 F.2d 753 (8th Cir. 1978), *cert. denied,* 436 U.S. 960, 98 S.Ct. 3079, 57 L.Ed.2d 1127 (1978). All causes of action accruing prior to October 21, 1978, 5 years before the complaint was filed, are therefore barred. Civil rights claims accrue at the time of the discriminatory or wrongful act, not when the consequences of the act become painful. *Chardon v. Fernandez,* 454 U.S. 6, 8, 102 S.Ct. 28, 70 L.Ed.2d 6, 9 (1981) (per curiam); *Delaware State College v. Ricks,* 449 U.S. 250, 258, 101 S.Ct. 498, 66 L.Ed.2d 431, 439-440 (1980). Almost all the acts of which petitioner herein complains occurred before October 21, 1978: the 1969 condemnation, an alleged refusal to allow his attorneys to address the City Council or the Mayor in 1972, an alleged refusal to allow Petitioner to farm or plant a garden on the condemned land in 1975, permitting the Davenport Water Company to trample or destroy Petitioner's crops in 1975. Acts occurring subsequent to that date were the 1980 condemnation and drainage improvement project, the 1980 bicycle path con-

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[1] Holding that the proper statute of limitations is the forum state's personal injury tort limitations statute, rather than the one which most closely corresponded to the federal claim.

[2] 42 U.S.C. Section 1986 contains a one year statute of limitations. All acts of which Petitioner complains occurred more than one year before the complaint was filed.

struction, the 1981 refusal to allow Petitioner to take firewood, and perhaps intermittent flooding, none of which rise to the level of constitutional torts and all of which are disposed of by the other grounds of the summary judgment motion. Even these are barred by Iowa's two year statute of limitations for personal injury torts. *Code of Iowa,* Section 614.1(2).

Petitioner appears to be placing reliance upon the doctrine of fraudulent concealment to delay the running of the statute of limitations. The doctrine does not assist him. This case is distinguishable from *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984), appeal pending, where the untruthful testimony was not discovered until 19 years after the incident when a witness recanted and where a far-reaching conspiracy to conceal the true facts existed. The undisputed facts presented in support of summary judgment here show Petitioner knew about the procedures that were followed in the 1969 condemnation from the very beginning and he was concerned about possible violations of his rights as early as 1971. In 1973, he consulted counsel about available remedies and legal theories for the alleged unlawful condemnation and alleged rights violations. The condemnation was a matter of public record. A person who has knowledge of a cause of action cannot claim concealment even though the details of the evidence to support the claim are not known to him. *Gruener v. City of Cedar Falls,* 189 N.W.2d 577, 581 (Iowa 1971).

Allowing Petitioner to now complain of acts occurring in the late 1960's and early 1970's, acts of which he was aware, and about which he has been concerned since their occurrence, would result in chaos and a total lack of finality in the affairs of man and government.

To the extent this action involves claims not rising to the level of constitutional torts or falling within the parameters of 42 U.S.C. Section 1982, et seq., such claims are barred by *Code of Iowa,* Section 613A.5 except any arising between April 21, 1983

and October 21, 1983.[3] Petitioner has acknowledged that he did not submit a notice of claim under the statute. He has not specifically pleaded any loss or damage accruing within 6 months of the filing of his complaint and the record reveals none.

The facts material to this ground of the summary judgment motion were not and are not in dispute. The law is clear. The courts below correctly determined that the claims were barred by the applicable statute of limitation. Review by this court would serve no public purpose.

B. Claim and Issue Preclusion

The other major basis for the motion was that Petitioner previously had his day in court on many of the issues presented. The principles of res judicata and collateral estoppel (claim and issue preclusion) apply to civil rights actions. *Migra v. Warren City School District Board of Education,* ____ U.S. ____, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); *Allen v. McCurry,* 449 U.S. 90, 101 S.Ct. 441, 66 L.Ed.2d 308 (1980). The preclusive effect to be given state court adjudications is governed by state law. *Migra,* 79 L.Ed.2d at 63-64. Under Iowa law, the actions must generally involve the same evidence, the same transactions, and the same parties. *Bd. of Sup'rs, Carroll County v. Chi. & NW Transp. Co.,* 260 N.W.2d 813, 816 (Iowa 1977). The claim and all attendant arguments and theories are put to rest and no matters growing out of the claim which could have been presented to the first court can be presented to the second. *B & B Asphalt Co., Inc. v. T.S. McShane Co., Inc.,* 242 N.W.2d 279, 286 (Iowa 1976). The Eighth Circuit in *Robbins v. District Court of Worth County, Iowa,* 592 F.2d 1015 (8th Cir. 1979), prohibited litigation of issues which were raised in the earlier state court action, as well as those which might have been raised.

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[3] Petitioner has repeatedly asserted he is not relying on tort allegations and does not seek recovery therefore.

Plaintiff now complains that the condemnation damages awarded were inadequate. He litigated this issue in 1971 and 1972, and received a verdict of nearly double the amount of the condemnation commission award. He was represented by counsel. He was entitled to present all available evidence on all allowable elements of damages. Under Iowa law the claims of illegality and of failure to comply with statutes, H.U.D. rules and court orders could have been asserted in the 1969 action for injunctive relief (which he aborted) or in the appeal from the condemnation commission award or even in his later actions to quiet title and enjoin construction of the bicycle path. See *Halweg v. City of Sioux City,* 189 N.W.2d 623 (Iowa 1971); *Bourjaily v. Johnson County,* 167 N.W.2d 630 (Iowa 1969);[4] *Heinz v. City of Davenport,* 230 Iowa 7, 296 N.W. 783 (1941).

Mr. Korey's challenges to the condemnation procedures and his prayer for a larger condemnation award were litigated or should have been raised in his prior suits. Because of this, they are barred by claim and issue preclusion and cannot be litigated now. The litigation history and issues presented in the various cases are not matters upon which there is any factual dispute. The rulings below were correct in light of the Iowa holdings on claim and issue preclusion. The granting of summary judgment for the city on this basis was correct. The numerous lawsuits brought by Mr. Korey against the city over more than a decade have effectively disposed of the claims presented herein, and the pending action should, therefore, be put to rest.

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[4] Here, the court went so far as to comment on the difficulty one could encounter in challenging a condemnation award without raising notice and procedural issues. 167 N.W.2d at 635.

CONCLUSION

Wherefore, Respondent respectfully prays the petition for writ of certiorari be denied.

Respectfully submitted,

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